IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. 352

GENERAL MOTORS CORPORATION; GENERAL MOTORS SALES CORPORATION; GENERAL MOTORS ACCEPTANCE CORPORATION; GENERAL MOTORS ACCEPTANCE CORPORATION OF INDIANA, INCORPORATED,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

JOHN THOMAS SMITH,
1775 Broadway,
New York, New York,

ERNEST S. BALLARD,
120 South LaSalle Street,
Chicago, Illinois.

Attorneys for Petitioners.

August 6, 1941.

HERBERT POPE,
HENRY M. HOGAN,
FERRIS E. HURD,
HENRY F. HERBERMANN,
Of Counsel.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

TABLE OF CONTENTS.

	PAGE
OPINIONS BELOW	1
JURISDICTION	2
STATUTE INVOLVED	2
SUMMARY STATEMENT OF THE MATTER INVOLVED	2
QUESTIONS PRESENTED	11
SPECIFICATION OF ERRORS TO BE URGED	12
REASONS FOR GRANTING THE WRIT	14
I. This petition presents questions of great public importance which have not been but should be authoritatively determined by this Court	14
II. The decision of the Circuit Court of Appeals is in conflict with the decision of this Court in *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, and with the decisions of other Circuit Courts of Appeals as to the interpretation of said decision	16
III. The decision of the Circuit Court of Appeals is in conflict with decisions of the Second and Eighth Circuit Courts of Appeals on the same matter	22
IV. The Circuit Court of Appeals has so far sanctioned a departure by the lower court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision	24
CONCLUSION	27

TABLE OF CASES CITED.

	PAGE
Addyston Pipe etc. Co. v. *United States*, 175 U. S. 211	17
Albrecht v. *Kinsella*, 119 F. (2d) 1003	20
Apex Hosiery Co. v. *Leader*, 310 U. S. 469	16, 18, 19, 20, 21, 22, 26
Appalachian Coals, Inc. v. *United States*, 288 U. S. 344	25
Atl. C. L. R. R. v. *Standard Oil Co.*, 275 U. S. 257	20
Chicago Board of Trade v. *United States*, 246 U. S. 231	24
Dr. Miles Medical Co. v. *Park & Sons Co.*, 220 U. S. 373	18, 25
Fed. Trade Comm. v. *Raymond Co.*, 263 U. S. 565	17
Great Atlantic & Pacific Tea Co. v. *Cream of Wheat Co.*, 227 Fed. 46	22
Hemphill v. *Orloff*, 277 U. S. 537	19
International Ladies' G. W. Union v. *Donnelly G. Co.*, 119 F. (2d) 892	20
Levering & G. Co. v. *Morrin*, 289 U. S. 103	20
Pick Mfg. Co. v. *General Motors Corporation*, 80 F. (2d) 641; aff'd, 299 U. S. 3	25
Public Utilities Comm. v. *Landon*, 249 U. S. 236	20
Schechter Corp. v. *United States*, 295 U. S. 495	20
United States v. *Colgate & Co.*, 250 U. S. 300	17
United States v. *General Electric*, 272 U. S. 476	18
United States v. *Gold*, 115 F. (2d) 236	20
United States v. *Socony Vacuum Oil Co.*, 310 U. S. 150	26
Whitwell v. *Continental Tobacco Co.*, 125 Fed. 454	22
Wood v. *The United States*, 16 Pet. 342	27
Worthington v. *United States*, 64 F. (2d) 936	27

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No.

GENERAL MOTORS CORPORATION; GENERAL MOTORS SALES CORPORATION; GENERAL MOTORS ACCEPTANCE CORPORATION; GENERAL MOTORS ACCEPTANCE CORPORATION OF INDIANA, INCORPORATED,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioners pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming the judgments of conviction rendered against each of the petitioners, after trial and verdict by the United States District Court for the Northern District of Indiana, in a criminal prosecution for conspiracy in restraint of interstate trade and commerce in violation of Section 1 of the Sherman Law.

Opinions Below.

The opinion of the District Court on demurrer to the indictment is reported in 26 Fed. Supp. 353. The opinions of the Circuit Court of Appeals are not yet reported. They are printed in volume VIII of the record, the original opinion at pages 4574 to 4630 and the opinion on petition for rehearing at pages 4632 to 4634.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on May 1, 1941.[1] Petitions for rehearing duly filed by petitioners were denied on July 2, 1941.[2] The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, and as modified by Rule XI of the Rules of Practice and Procedure after verdict in Criminal Cases.

Statute Involved.

The Act of July 2, 1890, c. 647, 26 Stat. 209 (U. S. C. Title 15, Sec. 1), known as the Sherman Law, provides in part as follows:

> "Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000 or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

Summary Statement of the Matter Involved.

Petitioners are General Motors Corporation (herein called GMC), which manufactures General Motors automobiles,[3] and three wholly-owned subsidiaries,[4] namely, General Motors Sales Corporation (herein called GMSC), the

---

[1] R. 4630.
[2] R. 4635.
[3] Ind. pars. 1, 30, R. 2, 8.
[4] R. 77-8.

selling agency for all General Motors automobiles,[5] and General Motors Acceptance Corporation and General Motors Acceptance Corporation of Indiana, Inc. (herein together called GMAC), discount companies engaged in financing the wholesale purchase and retail sale of General Motors automobiles by dealers.[6] There were also 19 individual defendants named in the indictment[7] who constituted the policy-determining body of petitioners.[8] The case was dismissed as to two of these at the opening of the trial[9] and the remaining 17 were acquitted by the jury.[10]

There are approximately 15,000 General Motors dealers in the United States who buy General Motors automobiles at wholesale from GMSC and sell them at retail.[11] They are independent economic units with their own invested capital.[12] The franchises under which they operate do not require the use of GMAC or make any reference to financing.[13]

The indictment charges that the petitioners have conspired to restrain the interstate trade and commerce in General Motors automobiles sold by GMC through GMSC to 15,000 General Motors dealers throughout the United States;[14] that the purpose of such conspiracy was to secure a monopoly of the business of financing the wholesale purchase by dealers of General Motors automobiles and the retail sale by them of both General Motors automobiles and used automobiles taken in trade;[15] and that such conspiracy

---

[5] Ind. par. 5, R. 3.
[6] Govt. Ex. 34, R. 3294.
[7] Ind. par. 32, R. 9.
[8] R. 78.
[9] R. 69.
[10] R. 1970-1.
[11] Ind. par. 4, R. 3.
[12] R. 4582.
[13] Govt. Exs. 13A to 13J, 14, R. 2541-2935.
[14] Ind. pars. 5, 34, R. 3, 9.
[15] Ind. par. 35, R. 10.

was to be effectuated by engaging in a course of conduct towards such dealers calculated to induce their use of GMAC financing, which was summarized by the court below as follows:[16]

> Requiring dealers to promise to use GMAC exclusively as a condition to obtaining a franchise for the sale, transportation and delivery of automobiles;
>
> Making contracts for short periods and cancellable without cause, cancelling or threatening to cancel such contracts unless GMAC facilities are used;
>
> Discriminating against dealers not using GMAC by refusing to deliver cars when ordered, delaying shipment and shipping cars of different number, model, color and style;
>
> Compelling dealers to disclose how they finance their wholesale purchases and retail sales, examining and inspecting dealers' books and accounts in order to procure this information, and requiring dealers to justify their using other financing media;
>
> Giving special favors to dealers using the wholesale and retail facilities of GMAC;
>
> Granting special favors to GMAC which are denied to other discount companies;
>
> Giving dealers a rebate from the GMAC finance charge paid by the retail purchaser, in order to induce use of GMAC financing facilities;
>
> Compelling dealers to refrain from using other finance companies by all other necessary, appropriate or effective means.

The evidence offered by the Government upon the trial consisted in part of forms used by petitioners in carrying on their business, announcements to dealers with respect thereto and statements of policy appearing in annual and

---

[16] R. 4576-7.

other reports, and in part of testimony and other evidence concerning the acts and declarations of petitioners' agents and employes in their contact with dealers.

The documentary evidence showed[17] that petitioners had cooperated in advancing their common interest and disclosed that their policy had been to urge the fair treatment by dealers of retail customers by offering them the advantage of financing on terms as favorable as those available through GMAC.

The evidence concerning the treatment of dealers was confined to the experiences of 75 dealers[18] out of an aggre-

---

[17] Govt. Ex. 3, R. 2355; Govt. Ex. 22, R. 3072, 3098-9, 3141-2.

[18] The Government called 47 General Motors dealers whose testimony covered their own experiences and those of two other dealers, making 49, to wit: Ackerman (R. 344); Anderson (R. 756); Blades (R. 666); Burger (R. 360); Burwell (R. 703); Cooke (R. 409); Craig (R. 693); Darling (R. 701); Disher (R. 567); Dollahan (R. 628); Downs (R. 699); Elliott (R. 593); Emich (R. 293); Fox (R. 411); Freund (R. 684); Geiger (R. 684); Harris (R. 511); Hellman (R. 522); Jones (R. 743); Kensinger (R. 372); Kessler (R. 654); Light (R. 589); Magers (R. 410); Martin (R. 737); Medcalf (R. 643); Mendez (R. 257); Miller (R. 676); Morrow (R. 775); Moyer (R. 326); Munson (R. 714); McCrary (R. 604); McDonald (R. 757); McGuire (R. 704); Neidhard (R. 617); Two other dealers in Cincinnati, Ohio (R. 619); Patterson (R. 561); Peterik (R. 648); Phillips (R. 416); Randel (R. 445); Smith (R. 503); Stolz (R. 688); Street (R. 680); Teague (R. 397); Traendly (R. 446); Underwood (R. 622); Weaver (R. 287); Wilson (R. 339); Wulliger (R. 546).

The Government also called four witnesses who were not dealers who testified about 17 additional General Motors dealers, to wit: Downtown Chevrolet Co., St. Louis, Mo. (R. 226); North Side Chevrolet Co., St. Louis, Mo. (R. 230); Patterson Chevrolet Co., St. Louis, Mo. (R. 231); Main Street Motor Co., Carlinville, Ill. (R. 234); Pontiac dealer at Carlinville, Ill. (R. 237); J. B. Baldwin, Inc., Winslow B. Felix, Spencer Kennelly, Gordon Warren, Bannon McGuire, J. V. Hough and T. H. McDearmon, California dealers (R. 502-503); Riley Chevrolet Co., Manchester, N. H. (R. 519); Another dealer whose name witness Young did not remember (R. 515); Beckwith Chevrolet Co., Bristol, Conn. (R. 518); Allen Chevrolet Co., Fort Wayne, Ind. (R. 735); South Side Chevrolet Co., Fort Wayne, Ind. (R. 735).

gate of more than 50,000 who functioned during the period of the alleged conspiracy.[19]

At the close of the Government's case, petitioners moved to dismiss and the trial court denied the motion.[20]

In the course of the presentation of petitioners' case, the trial court excluded evidence offered on two points. The first was evidence intended to show that GMAC rates were lower than the rates of other discount companies and that the practices of the latter were injurious to GMC, General Motors dealers and the buying public.[21] The second was evidence concerning the treatment by petitioners of dealers other than the 75 referred to in the Government's evidence, offered for the purpose of refuting the inference that the petitioners had conspired to treat all dealers in the manner indicated by the experiences of the 75.[22]

In his charge the trial court stated to the jury that the amount of commerce involved was not necessarily controlling, and gave the following illustration:[23]

The Government also offered in evidence 55 territorial managers' reports which referred to 9 additional dealers, to wit: Elledge-Barcroft, Granite City, Ill. (R. 3917); Ritchie (R. 3917); Campbell Auto Co., Richmond, Ind. (R. 3936); Lawrence Chevrolet, Winchester, Ind. (R. 3939); Fowler Chevrolet Sales, Charlotte, Mich. (R. 3944); Larson Chevrolet Co., Superior, Wis. (R. 3950); Century Motor Corp., Gary, Ind. (R. 3959); Verney J. Reynolds Co., Allegan, Mich. (R. 3969); Bel-Park Auto Sales, Chicago, Ill. (R. 3993).

[19] The conspiracy is supposed to have originated in 1925 (R. 4593). Defendants' exhibit 122-A shows the exact number of General Motors dealers each year from 1927 to 1938 (R. 4549). The record also shows that there is an average annual turnover of 15 per cent (R. 1388). This rate of turnover applied to the numbers of dealers from 1927 to 1938 shows that during that period there were, first and last, 51,810 dealers.

[20] R. 823-7.

[21] R. 893-6.

[22] R. 1040-4, 1051-4, 1059-60, 1062-86, 1131-45, 1151-2, 1154-5, 1160-1, 1179-82, 1216-7, 1219-23, 1286-8.

[23] R. 1937-8.

> "If a group of Indiana farmers, or two Indiana farmers, should stop a truck coming from Illinois loaded with corn because they did not want any Illinois corn in Indiana and prevent its entry, that is an unreasonable interference with interstate commerce, although it involves only one truck load of corn."

After the jury had retired they returned to the courtroom and asked the following question:[24]

> "It seems, your Honor, that a great many difficulties arose from the fact of Section 72, in regard to whether, if the defendants are found guilty of conspiracy and coercion, they would automatically be found guilty of this conspiracy in restraint of trade and commerce. If the evidence shows that they have coerced and conspired, would that mean that this conspiracy consisted of restraint of trade and commerce?"

The jury's difficulty may be understood from the fact that in the course of his main charge, the trial court had said:[25]

> "If the Government has proved beyond a reasonable doubt the acts averred to in this indictment, you have a right to find these defendants guilty."

In reply to the jury's inquiry, the trial court stated:[26]

> "As I said to you yesterday, the ultimate question for you to decide is this: Did the defendants conspire to restrain unreasonably or restrict unreasonably interstate commerce in General Motors cars? That is the ultimate question, but involved in that are the questions of fact as to whether the means that are set up

[24] R. 1948.
[25] R. 1940.
[26] R. 1949.

> in the indictment, the acts constituting the means by which the alleged conspiracy was effectuated, have been proved."

And further:[27]

> "It is the theory of the Government, and a theory which has been sustained by the court on demurrer, as constituting a valid charge under the anti-trust law, that the defendants proceeded beyond acts proper in themselves and arrived at a place where their acts were not proper, acts which prevented free action by their dealers in the selection of a financing company."

And further:[28]

> "The ultimate question, after all, is whether, under all the facts and circumstances the acts of coercion mentioned in the indictment and set up in the indictment have been proved beyond all reasonable doubt, and, second, if they have been so proved, whether they, as a result, effectuated an unreasonable restraint on the interstate commerce in General Motors automobiles. If they effectuated a restraint, then you have got to determine, from all the facts and circumstances, whether it was an unreasonable restraint."

The decision of the Circuit Court of Appeals upholding petitioners' conviction rested on three propositions, namely, (1) that the evidence was sufficient to show a conspiracy having as its purpose the control by petitioners of dealers' financing;[29] (2) that the coercion shown was aimed to compel dealer-purchasers to use GMAC in financing the whole-

---

[27] R. 1949.
[28] R. 1950.
[29] R. 4603.

sale purchase and retail sale of General Motors cars;[30] and (3) that the conspiracy had effectuated a restraint on the commerce in General Motors automobiles.[31]

The restraint referred to in the third holding is described in what might be called the crucial paragraph of the opinion, which was deleted[32] by the court on petition for rehearing and a revised text substituted. The substituted text is as follows:[33]

> "Obviously, if a customer * * * failed to purchase a General Motors car because he preferred another discount service, there would be a restraint of trade in General Motors cars, for the sale might have been consummated had the dealer and customer been free to use the service of other discount companies. Clearly the coercive and discriminatory practices employed by the appellants tended to reduce the supply of General Motors cars in the channels of trade, and did impede the free movement of that commerce from the factory to the ultimate car owner."

---

[30] R. 4603.

[31] R. 4605.

[32] The deleted paragraph of the original opinion of the Circuit Court of Appeals was as follows (R. 4634):

> "The record shows instances where GMAC would refuse credit to a retail customer or where a retail customer would fail to purchase a General Motors car because he was either dissatisfied with the GMAC service or preferred to use the service of other discount companies. Certainly in these cases the practice of coercing General Motors dealers to use GMAC would result in a restraint of trade inasmuch as the sale might have been consummated if the dealer and customer had been free to use the finance services of the other discount companies. Clearly the many restrictions imposed by the appellants upon the 15,000 independent General Motors dealers tended to reduce the supply of General Motors cars in the channels of commerce and trade, and did impede the free flow of that commerce from the factory to the ultimate car owner."

[33] R. 4634.

The precise nature of the restraint is further defined in the following paragraph of the opinion:[34]

> "Undoubtedly the movement of a car from a dealer to a retail purchaser in the same state is intrastate commerce, if considered as an isolated event or as a free transaction in and by itself. The whole picture from the evidence, however, shows a constantly moving flow of General Motors cars, planned and calculated to pass from GMC through GMSC through the dealers to the consumers, in a background where production is projected in advance of retail orders and later adjusted to retail consumption at the production end of the movement. Moreover, as we have already pointed out, the retail and wholesale phases of the commerce in General Motors cars are mutually dependent; restraints placed upon one phase of the commerce necessarily affect the other phase; and without the retail sale there could be no wholesale transaction. The true perspective is to be drawn from the whole picture, and the interstate commerce involved in this case is that from the manufacturer, through the dealers, to the ultimate consumer. Even assuming that the only interstate commerce involved is the movement of cars from the factory to the dealers, a restraint imposed upon the movement of cars from the dealers to the retail public would necessarily affect the shipment and movement of the cars while unquestionably they are in interstate commerce, and consequently we need not really decide when the interstate commerce ends and that which is intrastate commerce begins."

In arriving at its conclusions respecting the sufficiency of the evidence to support the verdict of the jury as above set out (*supra*, pp. 8-9), the Court of Appeals upheld[35] the

---

[34] R. 4611-12.
[35] R. 4617-22.

two rulings of the trial court excluding evidence offered by petitioners (*supra*, p. 6).

Questions Presented.

1. Do the activities of petitioners charged and proved constitute a conspiracy in restraint of interstate trade and commerce in violation of Section 1 of the Sherman Law?

This question has several aspects, namely:

(a) Can a manufacturing corporation and its wholly-owned subsidiaries whose business has developed by internal growth and not through external acquisition, engage solely among themselves in a conspiracy within the meaning of Section 1 of the Sherman Law?

(b) Is a manufacturing corporation which sells its products (through a wholly-owned subsidiary) only to dealers who will use the financing of its discount company guilty of restraint of trade within the meaning of Section 1 of the Sherman Law?

(c) Is a manufacturing corporation which, in the interest of protecting the public and enhancing its goodwill, imposes upon dealers a limitation as to the maximum price at which the resale of its product may be financed, guilty of a restraint of trade within the meaning of Section 1 of the Sherman Law?

(d) Did the indictment allege facts sufficient to show that the purpose or effect of petitioners' activities was to fix or raise the price or curtail the supply of General Motors automobiles in the interstate market?

(e) Was the evidence sufficient to show that petitioners' activities were intended to fix or raise the price or curtail the supply of General Motors automobiles in the interstate market or were sufficiently widespread to have that effect?

2. Did the Government establish the charge of a conspiracy directed against the entire body of General Motors dealers (admittedly numbering 15,000 at the time of the indictment but embracing more than 50,000 during the period of the alleged conspiracy) by proof of petitioners' activities in respect of a total of 75 such dealers?

3. Did the trial court err in excluding evidence proffered by petitioners with respect to their treatment of dealers other than the 75 dealers covered by the Government's evidence?

4. Did the trial court err in excluding evidence proffered by petitioners with respect to the rates and practices of outside finance companies and their effect upon the merchandising of General Motors automobiles?

5. Did the trial court err in charging the jury?

Specification of Errors to be Urged.

The Circuit Court of Appeals erred:

1. In affirming the action of the trial court overruling the demurrer to the indictment;

2. In holding that the activities of petitioners as established by the evidence constituted a conspiracy in restraint of trade;

3. In holding that the activities of petitioners as established by the evidence constituted a restraint of trade directed at or actually affecting the price or supply of General Motors automobiles in the interstate market;

4. In holding that the Government had established beyond a reasonable doubt the existence of the conspiracy charged in the indictment;

5. In refusing to hold that the trial court erred in excluding evidence proffered by petitioner to show that GMAC rates were lower than those of other discount companies and that such companies permitted practices inconsistent with good merchandising of automobiles;

6. In refusing to hold that the restraint, if any, imposed by petitioners was reasonable and in the interest of protecting and expanding their goodwill and that of the dealers and for the purpose of forwarding their legitimate personal interest;

7. In refusing to hold that the trial court erred in excluding evidence concerning the experiences of dealers proffered by petitioners for the purpose of showing the non-existence of a conspiracy directed against all dealers to compel them to use the services of GMAC;

8. In sustaining the trial court's charge to the jury to the effect that the amount of commerce involved in the restraint was immaterial;

9. In failing to hold that the trial court did not make clear to the jury that they must find that commerce was restrained in addition to finding that the petitioners had engaged in the activities charged in the indictment.

Reasons for Granting the Writ.

I.

THIS PETITION PRESENTS QUESTIONS OF GREAT PUBLIC IMPORTANCE WHICH HAVE NOT BEEN BUT SHOULD BE AUTHORITATIVELY DETERMINED BY THIS COURT.

In denying the motion of defendants made at the close of the Government's case to direct a verdict of not guilty, the trial judge said:[36]

> "This case is, I think, without precedent.
>
> The theory that underlies the indictment is one which, so far as I have learned, is completely without antecedent in any preceding case. But I don't know that lack of precedent is a bar.
>
> • • • • • •
>
> I observed in a late opinion of the Supreme Court that one of the Justices recently appointed expressly said that the court has been reconstructed. The fair implication of that opinion, as I read it, is that precedents may be of little avail and their lack no bar.
>
> • • • • • •
>
> But the occurrences that I have mentioned frequently place me in situations presenting serious questions. I find myself in a quandary as to when and how often a district judge should express his own solemn convictions.
>
> I am not saying that I have any in this case, but we have here a situation where, if I should allow this motion, there is no opportunity upon the part of the Government to have a review by the Supreme

[36] R. 825-7.

> Court, the action of which I cannot undertake to foretell, the decision of which I feel in no wise capable of prognosticating. If I should allow this motion the Supreme Court would not have the opportunity to decide what the law is in a case which is, as I have said, without precedent.
>
> * * * * * *
>
> It seems to me that unless I shall say, as a matter of law, that this theory of the government must be condemned, unless I can say, wholly on my own conviction, and with confidence, that I should deny anybody the chance to go to the Supreme Court, unless I can condemn with confidence and with assurance the legal theories embraced in this prosecution, and satisfy my own conscience as a trial judge that I have done the right thing in depriving the government of its chance to submit the matter to the Supreme Court, it is my duty to deny the motion."

It is, we believe, a matter of fair inference from the foregoing that the trial judge was doubtful of the Government's theory, even if he was not conscientiously convinced that the defendants were correct in their contentions. Though normally in a criminal prosecution all doubts are resolved in favor of the accused, the judge apparently was swayed by considerations of public interest to deny the motion, thus compelling the petitioners to run the risk of conviction for having engaged in a course of conduct which, in his view, was of doubtful criminality. If those considerations of public interest constituted a proper stimulus for the judge's action, they should be equally potent in persuading this Court to take jurisdiction.

That these petitioners have a vital stake in this litigation which makes it desirable for them to be accorded the

privilege of a hearing before the Court needs no argument.[37] But above all it is important, not only for these petitioners but also for business in general, to have this Court determine definitively whether the regulatory scope of the Sherman Act is fixed by the landmarks of past decisions or is to be broadened to include within its ban such activities as are here charged against the petitioners under what the trial judge deemed to be an unprecedented theory. So the interests of the general public and of the governmental law enforcement agencies coincide in this case with those of petitioners in furnishing persuasive reasons why this Court should take jurisdiction.

II.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH THE DECISION OF THIS COURT IN APEX HOSIERY CO. v. LEADER, 310 U. S. 469, AND WITH THE DECISIONS OF OTHER CIRCUIT COURTS OF APPEALS AS TO THE INTERPRETATION OF SAID DECISION.

It is proper to state that the remarks quoted in the preceding point were made by the trial judge before the case of *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, was decided by this Court. The opinion therein, after surveying the legislative history of the Sherman Law, the evils it was aimed at and the scope and meaning of the term "restraint of trade" under the common law, discusses at length the relevant decisions of this Court, and restates

[37] The government has instituted an equity suit against petitioners in the Northern District of Illinois, based upon the judgment in this case, to divorce GMAC from GMC. By order of July 15, 1941, the court in that case extended the time to answer, plead, or move until the further order of the court, for the purpose of awaiting the final decision in this case.

the criteria to be applied in determining in a given case whether the Sherman Law has been violated.

The essential elements of a Sherman Law offense are outlined thus (p. 500):

> (1) There must be a restraint of trade. This is defined to be synonymous with a restraint of commercial competition.
>
> (2) Such restraint must (a) be intended to fix or raise prices or to affect supply in the interstate market or (b) be so widespread as necessarily to have that effect.

THE FIRST ESSENTIAL ELEMENT.

Behind the Court's holding that the forbidden restraints are restraints of competition lies an implication vital to the issues of this case. Restraint of competition is the antithesis of freedom of competition which it is the object of the statute to preserve. Freedom of competition posits the freedom of the competitor to conduct his own business, untrammeled by restrictions imposed by third parties. Therefore, restraints wholly self-imposed by the trader in respect of his own business are not within the ban of the Statute. Consequently there is implicit in the holding that restraint of trade is synonymous with restraint of competition a reaffirmation of the doctrine asserted in *United States* v. *Colgate & Co.*, 250 U. S. 300, 307, and *Fed. Trade Comm.* v. *Raymond Co.*, 263 U. S. 565, 573, that a manufacturer has the right to exercise his own independent discretion as to the parties with whom he will deal.

Another implication flowing from the Court's language is the involvement of at least two competitors. It may be that the restraint is mutually imposed among the competitors, as in *Addyston Pipe Co.* v. *United States*, 175 U. S.

211. Again the restraint may be imposed upon competitors by a non-competitor, as in *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373. The restraint, however, must originate at least in part from sources having no lawful economic control over the party whose competition is restricted. Diversity of economic control must therefore be the measure of distinctness required of the two or more participants in a combination or conspiracy to restrain trade. Thus *United States* v. *General Electric Co.*, 272 U. S. 476, holds that a combination between a company and a plurality of distinct legal entities is not prohibited by the Sherman Law where unity of economic control is effected through the relationship of principal and agent.

The petitioners constitute an economic unit (*supra*, pp. 2-3). Despite this fact, the Circuit Court of Appeals determined (a) that petitioners could engage in a Sherman Act conspiracy, and (b) had done so by refusing to sell their products to dealers failing to patronize GMAC. This cannot be explained by saying that the dealers are parties to the combination. There is no such reference to them in the indictment and they cannot be brought in as "persons and corporations to the Grand Jurors unknown"[38] because the indictment itself makes it clear that they were as a class an integral part of the situation with which the Grand Jury was concerned and many dealers testified before it.

The determination of the Circuit Court of Appeals herein is directly in conflict with the decision in the *Apex* case, in the foregoing particulars.

---

[38] Ind. par. 34, R. 9-10.

THE SECOND ESSENTIAL ELEMENT.

This relates to the intended or actual effect of the restraint in interfering with the marketing of goods across State lines. We shall consider the intended effect and the actual effect separately.

Intended effect of alleged restraint. The Circuit Court of Appeals has squarely decided that there was no intent on the part of petitioners to restrict the marketing of General Motors automobiles across State lines, which was the specific charge of the indictment.[39] Such an intent would impute to petitioners the purpose of deliberate commercial self-destruction. Instead the Court has expressly found that petitioners' objective was to stimulate GMAC financing,[40] which applied to the resale of used cars taken in trade as well as to the purchase and sale of General Motors cars. Financing is not commerce. *Hemphill* v. *Orloff*, 277 U. S. 537. Consequently, there was not only no intent to effectuate the restraint of commerce charged in the indictment but no intent to effectuate any restraint of commerce.

Actual effect of alleged restraint. To affirm the judgment of conviction the Circuit Court of Appeals must therefore have found that petitioners' activities were so widespread as to fix or raise the prices or affect the supply of General Motors automobiles.

Such a conclusion is in direct conflict with the holding of this Court in the *Apex* case. The manner in which interstate marketing was affected is explained in the Court of Appeals' opinion in the passage quoted above on page 10 of this petition. At the beginning of that passage the Court seems to invoke the stream of commerce doctrine, but in

---

[39] Ind. par. 34, R. 9-10.

[40] R. 4603, 4633.

the last sentence it recedes from that position[41] and takes its stand upon the theory that the restriction on the dealer prevents the sale at retail of a car and thus interferes with the shipment of another car in interstate commerce to replace it.

The factual situation here presented differs from that in the *Apex* case only in this, that whereas there the interference was applied to the process of production at the place of inception of the interstate commerce, here the interference was applied to the process of local sale at the place of termination of the interstate commerce. The present case is in this respect precisely analogous to *Levering & G. Co.* v. *Morrin*, 289 U. S. 103. The decision of the Circuit Court of Appeals herein is therefore in direct conflict with both the *Apex* case and the *Levering* case.

The holding in the present case conflicts also with two other recent decisions, *Albrecht* v. *Kinsella*, 119 F. (2d) 1003, and *International Ladies' G. W. Union* v. *Donnelly G. Co.*, 119 F. (2d) 892, both of which harmonize with the decision in the *Apex* case. Surprisingly enough, the former was decided by the Court of Appeals for the Seventh Circuit. The latter was decided by the Court of Appeals for the Eighth Circuit.

The present decision also conflicts with *United States* v. *Gold*, 115 F. (2d) 236, 238. It is there stated that it is

---

[41] This was inevitable as the case went to the jury on the theory that the interstate commerce affected was that from factory to dealer (R. 1859, 1927). Moreover, the theory that the retail sale of General Motors automobiles is part of the interstate commerce from factory to dealer is legally untenable. *Schechter Corp.* v. *United States*, 295 U. S. 495, 542; *Atl. C. L. R. R.* v. *Standard Oil Co.*, 275 U. S. 257, 267; *Public Utilities Comm.* v. *Landon*, 249 U. S. 236, 245. The theory that the retail sale of used cars taken in trade is part of the interstate commerce from factory to dealer would be fantastic. But the Court would have been driven to that position if it had adopted the stream of commerce theory.

necessary under the *Apex* rule (where intent is absent) to prove an interference with the market so widespread as to affect prices or supply. If this be so, the judgment of affirmance in this case involves either a different interpretation of the *Apex* case or a finding that price or supply were thus affected.

However, the subject of price has never entered the case in any form. It is referred to nowhere in the indictment. The Government offered no evidence with regard to it and when the petitioners offered such evidence it was excluded on the Government's objection. Indeed the Government conceded that price was not involved.[42] The opinions of the court below do not refer to the subject of price nor to any intent on the part of petitioners to fix or raise prices nor do they mention any such effect.

If we examine the Court's holding on the issue of the supply of General Motors automobiles, we find, referring again to the foregoing excerpt from Judge Kerner's opinion (*supra*, p. 10), that in his view the restraint consists merely in the election of GMC to manufacture fewer automobiles. This represents nothing more than the lawful determination of a manufacturer to curtail his own production. The statement that the supply of General Motors cars in the channels of trade was reduced involves a misconception. In order to come within the *Apex* rule, the reduction must take place, altogether or to some extent at least, in a supply originating with an economic unit independent of the author of the restraint. The fact is, however, that there was no reduction in supply. On the contrary there was a constant and rapid increase throughout the period of the supposed conspiracy which reached the most remarkable proportions.[43]

---

[42] R. 894, 959, 1857.
[43] Def. Ex. 120-A, R. 4549.

If the writ herein prayed for be granted, this Court will have an opportunity authoritatively to express its views on the foregoing questions arising under its decision in the *Apex* case, which are of general and vital public interest, as well as to resolve the conflict in the holdings of the several Circuit Courts of Appeals as outlined above.

III.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH DECISIONS OF THE SECOND AND EIGHTH CIRCUIT COURTS OF APPEALS ON THE SAME MATTER.

The Seventh Circuit Court of Appeals, in the instant case, held that a manufacturing corporation and its subsidiaries which restricted the sale of the manufacturer's product to those who refrained from using outside financing *were guilty* of a conspiracy in restraint of trade in violation of Section 1 of the Sherman Law.

The Second Circuit Court of Appeals, in *Great Atlantic & Pacific Tea Co.* v. *Cream of Wheat Co.*, 227 Fed. 46, held that a manufacturing corporation which restricted the sale of its product to wholesalers *was not guilty* of a restraint of trade in violation of Section 1 of the Sherman Law.

The Eighth Circuit Court of Appeals, in *Whitwell* v. *Continental Tobacco Co.*, 125 Fed. 454, in a full opinion by Judge Sanborn, held that a manufacturing corporation and its employe who restricted the sale of the manufacturer's product to those who refrained from dealing in the products of the manufacturer's competitors *were not guilty* of a conspiracy in restraint of trade in violation of Section 1 of the Sherman Law.

The conflict between these decisions is irreconcilable. The only restraint of interstate commerce here charged or proved consists of the refusal of a manufacturer to ship to particular dealers. That is the theory on which the Government went to the jury[44] and it is the theory on which the Circuit Court of Appeals upheld the conviction.[45] In the Second and Eighth Circuit cases identical restraints were held innocent. In the former Judge Lacombe said (p. 49):

> "Before the Sherman Act it was the law that a trader might reject the offer of a proposing buyer, for any reason that appealed to him; it might be because he did not like the other's business methods, or because he had some personal difference with him, political, racial, or social. That was purely his own affair, with which nobody else had any concern. Neither the Sherman Act, nor any decision of the Supreme Court construing the same, nor the Clayton Act, has changed the law in this particular. We have not yet reached the stage where the selection of a trader's customers is made for him by the government."

We respectfully submit that this conflict between the Circuits should be resolved by this Court.

---

[44] R. 1859.
[45] R. 4611-12.

IV.

THE CIRCUIT COURT OF APPEALS HAS SO FAR SANCTIONED A DEPARTURE BY THE LOWER COURT FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

1. The indictment charged[46] and the Circuit Court of Appeals held[47] that the object and purpose of the conspiracy was to monopolize the financing of General Motors cars. Petitioners denied this charge and contended throughout the trial and in the Circuit Court of Appeals that the motive for their financing activities was the protection of GMC, General Motors dealers and the buying public from evils inherent in uncontrolled financing.[48] By way of supporting this contention they offered, *inter alia*, evidence that the rates of other discount companies were higher than those of GMAC and that their practices were injurious to automobile merchandising.[49] The trial court excluded this evidence[50] and the Circuit Court of Appeals held that this was not error.[51]

This ruling would appear to be in direct conflict with *Chicago Board of Trade* v. *United States*, 246 U. S. 231. The Court of Appeals attempted to distinguish that case by saying that there "the Government had not shown the actual or probable effect of the restraint upon interstate commerce."[52] But the fact is that the government had made precisely that showing, for this Court said that the legality

---

[46] Ind. par. 35, R. 10.
[47] R. 4603, 4633.
[48] R. 4620.
[49] R. 4619.
[50] R. 893-6.
[51] R. 4622.
[52] R. 4621.

of the arrangement could not "be determined by so simple a test, as whether it restrains competition" (p. 238). The true test was said to be whether the restraint merely regulates and thereby promotes competition or suppresses it. As to the evidence on which that issue is to be decided, this Court said (p. 238):

> "To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts."

To the same effect is *Appalachian Coals, Inc.* v. *United States,* 288 U. S. 344, 360-361.

We submit therefore that the exclusion of such evidence when offered by petitioners was clear error and error of such serious proportions and consequences as to call for the intervention of this Court.

Another important question is raised by the ruling under discussion which this Court should set at rest. May a trader, in the interest of protecting the public and enhancing his goodwill, impose upon dealers a limitation as to the *maximum* price at which an article may be resold while leaving the dealer free to sell as low as he pleases? See *Pick Mfg. Co.* v. *General Motors Corporation,* 80 F. (2d) 641, 653; affirmed, 299 U. S. 3; *Dr. Miles Medical Co.* v. *Park & Sons Co.,* 220 U. S. 373, 406-408. Basically, that problem is involved here, although the exact point is whether the manufacturer has the right to limit his dealers to a maximum charge for retail financing without restricting them in regard to the resale price of the automobiles

themselves. Whether such a restriction (which is the essence of the new low cost philosophy) is reasonable, has never been decided by this Court or any inferior tribunal. In *U. S.* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 221, 223, there is an intimation that any interference with the price structure, whether by way of raising, lowering or stabilizing prices, violates the law. This is not confined to the lowering of prices as a means of destroying competition. In the *Apex* decision, however, the ban of the law is seemingly confined by the express language of the opinion (310 U. S. 469, 500) to restraints which have the actual or intended effect of raising or fixing market prices. It would serve the public interest if this Court would render its definitive decision on the point involved. This case presents that opportunity.

2. The indictment charged a conspiracy to restrain the trade passing from GMS to General Motors dealers by treating all such dealers in the manner described in Paragraphs 36 to 62.[53] One way in which the Government sought to prove this conspiracy was by evidence that petitioners had treated 75 dealers[54] as the indictment charged they had conspired to treat all. First and last there were upwards of 50,000 dealers against whom the conspiracy was supposed to have been directed. Petitioners offered evidence of their treatment of other dealers, and were prepared to call such dealers until a showing representative of their treatment of all had been made. But the trial court excluded *all* such evidence.[55]

This deprived petitioners of the only practicable means of refuting the most important part of the Government's

---

[53] R. 10-14.

[54] *Supra*, p. 5, footnote 18.

[55] R. 1040-4, 1051-4, 1059-60, 1062-86, 1131-45, 1151-2, 1154-5, 1160-1, 1179-82, 1216-7, 1219-23, 1286-8.

case against them and constituted, we submit, a denial of due process. It was a clear departure from the usual course of judicial proceedings. *Worthington* v. *United States,* 64 F. (2d) 936, 940-2.

Moreover, an important question of federal law is involved which has not been, but should be settled by this Court. *Wood* v. *The United States,* 16 Pet. 342, comes close and would seem to establish the admissibility of the evidence in question. See discussion at pages 358 to 362. This petition offers an opportunity to settle the point.

Conclusion.

For the reasons stated, the writ should issue as prayed.

Respectfully submitted,

(Signed) JOHN THOMAS SMITH,
1775 Broadway,
New York, New York,

(Signed) ERNEST S. BALLARD,
120 South LaSalle Street,
Chicago, Illinois.
Attorneys for Petitioners.

August 6, 1941.

HERBERT POPE,
HENRY M. HOGAN,
FERRIS E. HURD,
HENRY F. HERBERMANN,
Of Counsel.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	3
Argument	11
Conclusion	21

CITATIONS

Cases:

Addyston Pipe & Steel Co. v. *United States*, 175 U. S. 211 -- 19

Albrecht v. *Kinsella*, 119 F. (2d) 1003 -- 14

Apex Hosiery Co. v. *Leader*, 310 U. S. 469 -- 11, 12, 13, 14, 21

Binderup v. *Pathe Exchange, Inc.*, 263 U. S. 291 -- 13

Dr. Miles Medical Co. v. *Park & Sons Co.*, 220 U. S. 373 -- 14, 17

Eastern States Retail Lumber Dealers Association v. *United States*, 234 U. S. 600 -- 13

Eastman Kodak Co. v. *Southern Photo Materials Co.*, 273 U. S. 359 -- 14

Ethyl Gasoline Corp. v. *United States*, 309 U. S. 436 -- 14, 15, 16, 20

Fashion Originators Guild v. *Federal Trade Commission*, 312 U. S. 457 -- 12, 13, 18, 19

Federal Trade Commission v. *Beech-Nut Packing Co.*, 257 U. S. 441 -- 14, 17

Federal Trade Commission v. *Raymond Bros.-Clark Company*, 263 U. S. 565 -- 17

Great Atlantic & Pacific Tea Company v. *Cream of Wheat Co.*, 227 Fed. 46 -- 15

Higgins v. *Smith*, 308 U. S. 473 -- 15

International Ladies' Garment Workers Union v. *Donnelly Garment Co.*, 119 F. (2d) 892 -- 14

Labor Board v. *Fainblatt*, 306 U. S. 601 -- 21

Loewe v. *Lawlor*, 208 U. S. 274 -- 14

Montague & Co. v. *Lowry*, 193 U. S. 38 -- 13

New Colonial Ice Co. v. *Helvering*, 292 U. S. 435 -- 15

Paramount Famous Lasky Corp. v. *United States*, 282 U. S. 30 -- 14

411854—41——1

Page

Cases—Continued.

Patterson v. *United States*, 222 Fed. 599 certiorari denied, 238 U. S. 635 15

Taylor v. *Standard Gas Co.*, 306 U. S. 307 15

United States v. *American Tobacco Co.*, 221 U. S. 106 16

United States v. *First National Pictures, Inc.*, 282 U. S. 44 14

United States v. *Gold*, 115 F. (2d) 236 14

United States v. *Pacific & Arctic Co.*, 228 U. S. 87 14

United States v. *Socony-Vacuum Oil Co.*, 310 U. S. 150 21

Whitwell v. *Continental Tobacco Company*, 125 Fed. 454 ..... 15, 16

Worthington v. *United States*, 64 F. (2d) 936 21

Statutes:

Sherman Act, Act of July 2, 1890, 26 Stat. 209, 15 U. S. C., sec. 1 2

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 352

GENERAL MOTORS CORPORATION; GENERAL MOTORS SALES CORPORATION; GENERAL MOTORS ACCEPTANCE CORPORATION; GENERAL MOTORS ACCEPTANCE CORPORATION OF INDIANA, INCORPORATED, PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court on demurrer to the indictment (R. 22–26; see also R. 66) is reported in 26 F. Supp. 353. The opinions of the circuit court of appeals (R. 4574–4634) are reported in 121 F. (2d) 376.

JURISDICTION

The judgment of the circuit court of appeals was entered on May 1, 1941 (R. 4630), and petitions for

rehearing were denied July 2, 1941 (R. 4635). The petition for a writ of certiorari was filed August 6, 1941. The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and as modified by Rule XI of the Rules of Practice and Procedure after verdict in Criminal Cases.

QUESTIONS PRESENTED

1. Whether a program by which a manufacturing corporation and its subsidiaries agree to subject dealers to coercive and discriminatory treatment for the purpose of forcing them to use an affiliated finance company, both for their wholesale purchases and retail sales, violates section 1 of the Sherman Antitrust Act.

2. Whether the trial court erred in excluding evidence (a) as to the soundness of the methods of financing of the subsidiary finance company as compared with those of other finance companies, and (b) that many dealers had not themselves been coerced.

STATUTE INVOLVED

Section 1 of the Sherman Antitrust Law, Act of July 2, 1890, 26 Stat. 209, 15 U. S. C., sec. 1:

> SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. * * *

STATEMENT

Petitioners are General Motors Corporation (hereinafter called G. M. C.), which manufactures automobiles, and three wholly owned subsidiaries, namely, General Motors Sales Corporation (hereinafter called G. M. S. C.), the selling agency for all General Motors automobiles, and General Motors Acceptance Corporation, and General Motors Acceptance Corporation of Indiana, Inc. (hereinafter together called G. M. A. C.), discount companies engaged in financing the wholesale purchase and retail sale of General Motors automobiles by dealers. With 19 individual officials of those companies, petitioners were indicted for having violated Section 1 of the Sherman Antitrust Law [1] (R. 2–16). Demurrers were overruled by two district judges (R. 22, 66).[2] The case was tried from October 9, 1939, to November 17, 1939. The jury returned a verdict of guilty against the corporate defendants and of not guilty against the individual defendants (R.

[1] Because no attack is now made on the sufficiency of the indictment as a pleading, it seems unnecessary to summarize its allegations.

[2] After overruling the demurrers, District Judge Slick disqualified himself from further participation in the case, and the case was assigned to District Judge Lindley (R. 27–28). At the request of the defendants he set aside Judge Slick's order overruling the demurrers, but then overruled them on his own account (R. 65–66).

1955). The facts, as disclosed by the testimony, may be summarized as follows:[3]

General Motors cars[4] are manufactured by G. M. C. in seven states. They are sold at the factory by G. M. C. to G. M. S. C. (R. 3739–3751). G. M. S. C. in turn sells them to approximately 15,000 automobile dealers situated in all of the states (R. 120, 141). The dealers are required to pay for the cars before shipment (R. 141). The dealers then sell the cars to retail purchasers.

The unit price for automobiles is high. In order to sell cars in large quantities, financing facilities are necessary both for dealers who purchase the cars at wholesale and for retail purchasers (R. 935). The petitioner G. M. A. C. and several hundred other companies are engaged in the business of supplying funds both to dealers and to the retail purchasers (R. 935).

Dealers purchasing cars at the factory must pay either by check or sight draft or establish credit arrangements with G. M. A. C. (R. 840, 841). If the services of other finance companies are used, such companies must advance the money necessary to pay for the cars at the time of shipment (R. 187, 920–921). In any event title or a property interest in the car passes to the dealer before shipment (R. 140, 141, 174, 175). Retail

[3] The evidence is summarized at greater length in the opinion of the Circuit Court of Appeals (R. 4581–4603).

[4] Chevrolet, Pontiac, Oldsmobile, Buick, La Salle, Cadillac.

purchasers desiring credit enter into conditional sales agreements with the dealers; the practice of the dealers is to assign these agreements to a finance company, in return for the face amount of the contract of sale exclusive of the finance charge (R. 855–856). Inasmuch as most dealers and retail purchasers are unable to pay outright for cars, the availability of financing facilities is essential to the movement in interstate commerce of by far the greater volume of General Motors cars (R. 882–885, 935; Gov't Ex. 22, R. 3119).

Dealers operate under contracts or franchises issued by G. M. S. C. These contracts may be cancelled on short notice and without cause (Gov't Exs. 13–14, R. 2769–2772, 2850). They specify that the dealer is under no circumstances to be considered the agent or legal representative of G. M. S. C. (Gov't Exs. 13–14, R. 2769, 2836), and the dealers are in fact separate economic units with their own invested capital (Gov't Ex. 14, R. 2891; R. 1370–1371). Each dealer is required to have a substantial investment in building, parts and accessories, and to have ample space and personnel (Gov't Ex. 14, R. 2885–2887). The dealers are required to make regularly written reports to G. M. S. C. and G. M. A. C. revealing the details of their operations (R. 249–252, 879, 881, 1397, 1638, 3881, 3883; Gov't Ex. 13, R. 2795; Gov't Ex. 116, R. 3879; Gov't Ex. 167, R. 3883).

G. M. A. C. was established in 1919 for the purpose of supplying credit facilities to purchasers of General Motors automobiles (R. 935). Its policy has differed from that of most other finance companies in that it requires dealers to guarantee by endorsement the retail paper assigned to it (Gov't Ex. 22, R. 3097; R. 940, 951). Partly for this reason, many dealers have preferred to use other finance companies (R. 873, 951–952). In 1925 the failure of the dealers to use G. M. A. C. began to disturb the General Motors executives, and in that year they initiated a program of "making every possible effort"[5] to induce dealers to use G. M. A. C. (R. 107, 108, 489, 504–506, 949, 961, 969, 996; Def.'s Ex. 49, R. 4181). This program has continued up until the time of the indictment in 1938 (R. 257–393, 398–485, 503–514, 522–730, 737–740, 743–777, 797–823, 875, 3916–4003). Between 1925, when the campaign began, and 1926 the total volume of G. M. A. C.'s business increased 225%, from $281,426,772 to $631,543,573 (Gov't Ex. 22, R. 3117); by 1937, 65% of the cars sold to dealers on time and 75% of retail sales on time were financed by G. M. A. C. (R. 4591–4592, 882–883).

The method primarily employed was to threaten to cancel the franchise of any dealer who refused to give all, or a sufficient proportion of, his time

[5] The quoted language is that of petitioners' counsel (R. 108).

paper to G. M. A. C. (R. 297–299, 307–308, 327–329, 349, 368, 412, 417–425, 441, 445, 453, 463–464, 498, 504–505, 524–525, 548, 556, 568, 576, 610, 622–624, 669, 688, 701, 702, 715–716, 757, 775, 3464). This was often accomplished by a joint visit of representatives of G. M. A. C. and G. M. S. C. to the dealer (R. 204, 227, 250, 256, 262, 416–417, 530–531, 547, 551–552, 562, 574–575, 606, 607–608, 651, 688, 700–701, 705, 706, 707, 708, Gov't Ex. 176–I, R. 3930, Gov't Ex. 181–K, R. 3984, Gov't Ex. 181–D, R. 3973), at which times the dealer was told that he must use G. M. A. C. facilities or give up his business (Gov't Ex. 176–I, R. 3930, 606, 608, 710–711, 713). Similar pressure was exerted at the contract renewal meetings held annually in each zone or region[6] (R. 209–211, 289–291, 340, 341, 352, 363–364, 365, 413, 460, 515, 534–535, 547, 552, 554, 563, 564, 573, 594, 684, 685, 703, 715–716, 776, Gov't Ex. 52, R. 3453). At such meetings each dealer is required to make satisfactory commitments to representatives of both G. M. S. C. and G. M. A. C. as a condition precedent to continuance of the dealership (R. 209–211, 297, 363–364, 418, 460, 547, 573, 684, 688, 715–716, 722–726, 736–737, Gov't Ex. 118, R. 3575, Gov't Ex. 147, R. 3608).

[6] Since the contracts did not expire annually but continued until terminated (Gov't Exs. 13–14, R. 2769–2770, 2850), the question actually decided was not whether the contracts should be renewed but whether G. M. S. C. should exercise its prerogative of cancelling them.

G. M. A. C.'s approval cannot be obtained until the dealer agrees to give his financing to that company (R. 207–208, 343, 345, 352, 365–366, 413, 547, 552, 563–564, 570, 571, 573, 625, 685, 708, 770, Gov't Ex. 108, R. 3558). Through the interchange of records which G. M. S. C. requires every dealer to file G. M. S. C. and G. M. A. C. are apprised of the proportion of business each dealer gives to G. M. A. C. (R. 225, 249–252, 395, 879–881, 1415, 3881, 3883).

Since every dealer has made a substantial investment in his business, the threat to cancel the franchise is a potent one. The threat in a number of instances has been carried out when a dealer has insisted on his right to finance with whom he pleases (R. 271–272, 304, 307, 308, 327, 363–369, 345, 349, 460–464, 504–505, 525, 548, 568, 576, 595–596, 609–610, 619, 624, 641–642, 654, 683, 718, 746–747, 757). The record also discloses numerous other means employed by petitioners to compel dealers to use G. M. A. C. (R. 257–393, 398–485, 503–514, 522–730, 737–740, 743–777, 797–823, 3916, 4003). New dealers were compelled to agree in advance to let G. M. A. C. do their financing (R. 261–262, 287, 380–381, 528–529, 551, 590–591, 605, 625, 630–631, 650, 653, 667, 681, 685, 703, 751–752). Dealers failing to use G. M. A. C. were shipped more cars or different kinds of cars than had been ordered (R. 263–264, 291–292, 294, 301, 401–408, 415, 619, 669, 767, 768), found

difficulty in obtaining cars promptly when ordered (R. 415, 564, 579, 678–680, 694–695, 708, 709, 763, 765, 775), were refused the use of G. M. A. C. for wholesale purchases if they did not furnish adequate retail business (R. 254–255, 606, 664, 665, 767, Gov't Ex. 176–J, R. 3931–3932),[7] or were deprived of a reserve fund on the books of G. M. A. C.[8] (R. 346, Gov't Ex. 181–H, R. 3980).

That these were the means of carrying out petitioners' program "of making every possible effort" to get dealers to use G. M. A. C. is demonstrated not only by testimony of 48 dealer witnesses (R. 257–393, 398–485, 503–514, 522–730, 737–740, 743–777) but also by the admissions of a number of petitioners' ranking officials (R. 93–193, 198–257, 393–397, 485–503, 514–521, 830–926, 934–976, 976–1018, 1368–1420, 1787–1830), by reports on dealer relationships in petitioners' files (R. 797–823, 3916–4003), and a large amount of other documentary material. Typical illustrations of

---

[7] As has been pointed out (*supra*, p. 4), only through the use of G. M. A. C. for wholesale credit could dealers avoid the necessity of having to pay cash for cars before receiving them.

[8] To compensate for the fact that dealers were required to guarantee the paper sold to G. M. A. C., that company added to the regular finance charge a so-called "dealers reserve," to protect the dealer against losses occasioned by repossessions (Gov't Ex. 29, R. 866, 3182). This reserve was greater than the amount actually needed for such purposes, and hence it constituted a profit to the average dealer (R. 968–969, 1010).

the evidence appear in the opinion of the Circuit Court of Appeals (R. 4597–4602), and it is unnecessary to repeat them here.

During the trial, petitioners offered to introduce evidence as to the rates and practices of other finance companies in order to show the "reasonableness" of the G. M. A. C. plan (R. 893–896). Petitioners also indicated that they were prepared to call all of the 15,000 (or 50,000)[9] dealers not called by the Government to testify that they had not been discriminated against or coerced into using the financing facilities of G. M. A. C. (R. 1180). Both of these lines of testimony were excluded by the trial court as irrelevant (R. 893–896, 1179–1182).

The trial court charged the jury that although it was perfectly proper for petitioners to select their own dealers, determine the terms upon which they would sell, and attempt to persuade dealers to accept those terms, they could not apply duress to the dealers or use something within their power "as a club to coerce" them (R. 1938–1939). The court further charged that the ultimate questions in the case were (1) whether coercion had been proved, and (2) if so, whether the acts proved had effectuated an unreasonable restraint on interstate commerce in General Motors cars (R. 1940, 1950–

[9] The dealers numbered 15,000 at any one time, but embraced more than 50,000 during the period of the conspiracy (R. 120, 1388). (See Petition, p. 6.)

1951). The jury found the corporate defendants guilty (R. 1955).

On appeal the circuit court of appeals concluded not only that the findings of the jury as to conspiracy and coercion were plainly supported by the evidence, but also that it would have reached the same conclusion from an analysis of the record *de novo* (R. 4604–4605).[10] The court further held that restraints applied to wholesale and retail financing affected the shipment and movement of cars in interstate commerce (R. 4611–4613), and that in view of General Motors power over the fate of the dealers, the tying of financing conditions to the wholesale purchase and retail sale of cars constituted an unreasonable restraint of the commerce of the dealers.

ARGUMENT

I

The petitioners urge (Pet. 16–22) that the writ be granted because of a conflict between the decision below and *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469. There is no similarity between the facts of that case and of this one, and petitioners assert only that some of the general remarks appearing in the *Apex* opinion are inconsistent with the decision below. Petitioners sum-

[10] Petitioners' brief in the circuit court of appeals admitted that there was some direct evidence in the record supporting the charges (G. M. A. C. Brief, p. 69, R. 4592).

marize the *Apex* opinion as holding that to violate the Sherman Act there must be (1) a "restraint of commercial competition", which (2) is intended to or does fix or raise prices or affect supply (Pet. 17). In this case there is a restraint both on the competition of the dealers and of finance companies other than G. M. A. C., so that the first of the above requisites is unquestionably met.

Petitioners' primary argument seems to be that the *Apex* case holds the Sherman Act applicable only to restraints directed at price and supply. This ignores the actual language of this Court's opinion, the subsequent decision in *Fashion Originators Guild* v. *Federal Trade Commission,* 312 U. S. 457, and that the protection of the small dealer is a fundamental objective of the Sherman Act. The *Apex* opinion repeatedly recognizes that the Act applies to "transactions which tended to restrict production, raise prices or *otherwise control the market to the detriment of purchasers or consumers of goods and services*" (310 U. S., at 493),[11] and to any effort or attempt "to monopolize

[11] Again, the opinion declares that the Act applies to "contracts for the *restriction or suppression of competition in the market*" and practices which "take from buyers or consumers the advantages which accrue to them from free competition in the market" as well as agreements affecting price and supply (310 U. S., at 497), and to restraints shown to have or "intended to have an effect upon prices in the market or *otherwise to deprive purchasers or consumers of the advantages which they derive from free competition*" (310 U. S., at 501) [italics supplied].

the supply, control its price or *discriminate between its would-be purchasers"* (310 U. S. at 510, 511, 512) [italics supplied]. And in the *Fashion Guild* case, subsequently decided, this Court squarely held that the regulating of prices and the limiting of production did "not exhaust the types of conduct banned by the Sherman and Clayton Acts" (312 U. S., at 466).

Indeed, the Sherman Act has always been assumed to apply to restraints which discriminate against and obstruct the freedom of trade of individual purchasers or groups of purchasers, even though the general price structure or total supply of a commodity is not affected. References in many Sherman Act opinions to the restriction of supply frequently mean only the supply of the dealer who is oppressed, and not the total amount available to the country at large.[12] In this case petitioners have discriminated against and threatened to curtail the supplies of purchasers who refuse to use G. M. A. C. to the extent desired, and thus have taken from buyers and consumers the advantages which accrue to them from free competition in the market. The decision below holding such practices unlawful

[12] See *Fashion Originators Guild* v. *Federal Trade Commission*, *supra*; *Binderup* v. *Pathe Exchange, Inc.*, 263 U. S. 291; *Montague & Co.* v. *Lowry*, 193 U. S. 38; *Eastern States Retail Lumber Dealers Association* v. *United States*, 234 U. S. 600; *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U. S. 359; *Paramount Famous Lasky Corp.* v. *United*

thus follows the *Apex* case and can hardly be said to conflict with it.[13]

Nor is petitioners' contention that competition cannot be restrained by a practice applicable only to one's own product supported by the *Apex* case, which deals entirely with another subject. In any event, petitioners' basic assumption conflicts with such cases as *Ethyl Gasoline Corp.* v. *United States,* 309 U. S. 436 (where the defendants' claims were supported by a patent), *Dr. Miles Medical Co.* v. *Park & Sons Co.,* 220 U. S. 373, and *Federal Trade Commission* v. *Beech-Nut Packing Co.,* 257 U. S. 441, which hold that a manufacturer cannot, by threats to discontinue supplies, force wholesalers and retailers to adhere to fixed resale prices for his products. Imposition of such a condition upon the purchase of one's products does not differ in kind or legal consequence from a re-

---

States, 282 U. S. 30; *United States* v. *First National Pictures, Inc.*, 282 U. S. 44; *United States* v. *Pacific & Arctic Co.*, 228 U. S. 87; *Loewe* v. *Lawlor*, 208 U. S. 274.

[13] For the same reason the decision does not conflict with *International Ladies' Garment Workers Union* v. *Donnelly Garment Co.*, 119 F. (2d) 892 (C. C. A. 8) or *United States* v. *Gold*, 115 F. (2d) 236 (C. C. A. 2)), each of which merely applies the principles set forth in the *Apex* case to situations in which labor unions are involved. *Albrecht* v. *Kinsella*, 119 F. (2d) 1003 (C. C. A. 7), also relied upon by petitioners as conflicting, is a decision rendered by the court below 20 days after its decision in the case at bar. The case has no bearing upon the instant problem apart from the fact that it contains a quotation from the *Apex* case.

quirement that the purchaser use a particular finance company for its credit transactions.

Petitioners also argue (p. 18) that there can be no conspiracy to restrain trade by persons who are parts of a single economic unit. This proposition is inconsistent with cases holding that a corporation and its own officers can conspire to restrain the trade of others in violation of Section 1 of the Sherman Act. *Ethyl Gasoline Corp.* v. *United States,* 309 U. S. 436; *Patterson* v. *United States,* 222 Fed. 599, 618–619 (C. C. A. 6), certiorari denied 238 U. S. 635. The same is, of course, true of a corporation and its subsidiaries.[14]

II

Petitioners assert that the decision below conflicts with *Great Atlantic & Pacific Tea Company* v. *Cream of Wheat Co.,* 227 Fed. 46 (C. C. A. 2) and *Whitwell* v. *Continental Tobacco Company,* 125 Fed. 454 (C. C. A. 8).

In the *A. & P.* case it was held that it was not a violation of the Sherman Act for the seller of 1% of a commodity to confine its sales exclusively

[14] Petitioners are in no position, and do not appear, to urge that the separate corporate existence of G. M. S. C. and G. M. A. C. be ignored. Although the corporate fiction will be disregarded when necessary to prevent injustice or fraud, a person who for his own benefit sets up a corporation cannot himself ignore it whenever it becomes disadvantageous. *Taylor* v. *Standard Gas Co.,* 306 U. S. 307, 332; *Higgins* v. *Smith,* 308 U. S. 473, 477; *New Colonial Ice Co.* v. *Helvering,* 292 U. S. 435, 442.

to wholesalers and accordingly to refuse to sell to the A. & P., a chain of retail stores. Since the seller in that case did not and was in no position to impose any coercive restrictions upon the manner in which purchasers of its product should conduct their business after they had obtained it, the case is wholly different from that at bar.

In the *Continental Tobacco* case, the tobacco company, which owned or controlled "most of the valuable and leading brands of plug and chewing tobacco in the United States," forced each purchaser to accept an allotment for each four-month period "much in excess of the amount which he would be able to sell during that time," and at a price "so high" that, if paid, the purchaser could not make a profit (125 Fed., at 456). The company required purchasers "to refrain from dealing in plug chewing tobacco made by independent and competing manufacturers." If they did so refrain, the allotment would be reasonably reduced and a sufficient percentage of the price rebated so as to permit the purchaser to make a profit. This device was obviously intended to give the tobacco company a monopoly of the plug and chewing-tobacco industry. The decision of the Circuit Court of Appeals holding such a scheme to be lawful was rendered in 1903, and is inconsistent with basic principles which have now been long established. See *Ethyl Gasoline Corp.* v. *United States,* 309 U. S. 436; *United States* v. *American*

Tobacco Co., 221 U. S. 106; *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373; *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U. S. 441.

The *A. & P.* case and the *Tobacco* case stand, at most, for the unquestioned proposition that a merchant ordinarily has a right to sell to whom he chooses.[15] See *Federal Trade Commission* v. *Raymond Bros.-Clark Company*, 263 U. S. 565. But this right does not permit the coercive imposition of conditions destructive of competition and free trade by a seller who dominates the market (*supra*, p. 14).

Petitioners' suggestion that they have a right to impose any restrictions they please upon their own commerce overlooks the fact that the commerce restricted by their practices is actually that of the dealers. The record discloses that G. M. A. C. and G. M. S. C. insist that dealer-purchasers pay cash for and obtain title (or a property interest if the finance company retains title as security for its loan) to the cars before shipment at the factory. Thus the coercion exercised by petitioners interferes with the commerce of the dealers and not with their own.

III

Point IV of the petition for certiorari (pp. 24–27) urges the granting of the writ on the ground

[15] This right was recognized by the trial court in its charge to the jury (R. 1938–1939).

that the lower courts have seriously departed from "the accepted and usual course of judicial proceedings." This charge is supported only by the claim that the trial court made two errors in the exclusion of evidence. It is submitted that the trial court's rulings were correct, and that in any event the evidentiary questions raised are not of sufficient importance to warrant review by this Court.

1. The trial court refused to permit the introduction of evidence showing that G. M. A. C. finance charges were lower than those of other finance companies, and that the object of the plan to further G. M. A. C. was to protect dealers against harmful merchandising practices.[16] Petitioners' argument seems to be that prices were not fixed or affected by the conspiracy charged, and hence the Court was required to enter into a study of the reasonableness of the restraint from a general economic viewpoint.

The same point was made and rejected in *Fashion Originators Guild* v. *Federal Trade Commission, supra.* This Court there upheld the exclusion of evidence as to reasonableness on the

[16] Although petitioners seek to give the impression that they were motivated largely by altruism in imposing upon dealers the "sound" financial policies of G. M. A. C., it may be noted that G. M. A. C. averaged $14,000,000 in profits annually between 1935 and 1938 (R. 3125). An officer of G. M. S. C. stated at a meeting of dealers that "they needed the profits in G. M. A. C., and he was not interested in filling the pockets of independent finance companies" (R. 623).

ground that the evidence as to "the reasonableness of the methods pursued" in a coercive plan which tended toward monopoly "is no more material than would be the reasonableness of the prices fixed by unlawful combination." Petitioners' effort in this case to force dealers to use the chosen finance company would seem clearly to have less justification than the attempt in the *Fashion Guild* case to prevent "style piracy." The Sherman Act is violated by any scheme of the person or person in control of a market to force upon independent merchants a particular method of dealing, even though the plan is believed to be and may in fact be economically sound. It is not for "extra-governmental" agencies to attempt to regulate interstate commerce by restricting the freedom of those who do not conform to their views. *Fashion Originators Guild* v. *Federal Trade Commission, supra; Addyston Pipe & Steel Co.* v. *United States,* 175 U. S., 211, 242.

The *Fashion Guild* case also answers petitioners' suggestion that it is important for this Court to decide whether a restriction which might have the effect of lowering prices would be lawful. In that case the Court pointed out that the antitrust laws were designed to protect small businessmen, and that a monopoly or combination which drove small dealers out of business might be unlawful even if it might "temporarily or *even permanently* reduce the price of articles

manufactured or sold." [Italics supplied.] This language is particularly pertinent as applied to the case at bar.

2. The evidence relied upon by the Government to prove the existence of the conspiracy consisted of documentary material, the admissions of petitioners' officers and agents, and testimony largely oral, relating to 75 dealers that they had been discriminated against and coerced by petitioners in an effort to get them to use G. M. A. C. Petitioners then called 84 dealers (R. 1039–1087, 1130–1183, 1214–1243, 1286–1289) and also offered to call substantially all the other 15,000 (if not 50,000)[17] dealers (R. 1180, 4617) who might have been restrained. The offer was not to show that the dealers testifying as to coercion had not been coerced, but that no coercion had been applied to the additional dealers called.

The latter evidence was excluded on the ground that it would not disprove the existence of an illegal conspiracy. The Government was not required to prove that all, or indeed any, dealers were in fact coerced.[18] Since the offense under the Sherman Act is a conspiracy to coerce and not coercion, the charge could have been proved with-

[17] See Petition, p. 6.

[18] Once petitioners' policy was established and had become familiar to the trade, it would influence dealers without the necessity of enforcement. Mere knowledge of petitioners' attitude and means of controlling dealers would persuade the latter not to risk forfeiting their franchises. Cf. *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436, 453.

out showing that any actual coercion occurred. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 225. And a conspiracy to coerce even a small number of dealers would in itself have been illegal. "* * * it is the nature of the restraint and its effect on interstate commerce and not the amount of the commerce which are the tests of violation. See *United States* v. *Socony-Vacuum Oil Co., ante,* p. 224, note 59. Cf. *Labor Board* v. *Fainblatt,* 306 U. S. 601, 606." *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469, 485. The statements of many dealers that they had not been coerced would not have refuted the testimony of those who said they had been, and thus would not have disproved the existence of an illegal conspiracy (see opinion below, R. 4617–4619).[19] Finally, when an offer is made to call hundreds and perhaps thousands of witnesses whose testimony would have, if any, only slight probative value, the trial court must be vested with some discretionary power to see that the trial does not go on forever. See *United States* v. *Socony-Vacuum Oil Company,* 310 U. S. 150, 230.

CONCLUSION

The decision below does no more than apply established principles to the facts before the court.

[19] In this respect the present case differs from *Worthington* v. *United States*, 64 F. (2d) 936 (C. C. A. 7), relied on by petitioners. The Circuit Court of Appeals had no difficulty in distinguishing its own prior decision, written by Judge Evans, who also participated in the decision of the present case (R. 4619).

It does not conflict with any decision of this Court or any circuit court of appeals; on the contrary, under the precedents no other decision could have been reached. The decision of the District Court has already been reviewed in the exhaustive opinion of the Circuit Court of Appeals, and the complete and thoroughly sound analysis of the questions presented in that opinion makes unnecessary a second consideration of the issues here. For these reasons the petition for certiorari should be denied.

Respectfully submitted.

CHARLES FAHY,
Acting Solicitor General.
THURMAN ARNOLD,
Assistant Attorney General.
HOLMES BALDRIDGE,
VICTOR O. WATERS,
ROBERT L. STERN,
Special Assistants to the Attorney General.

September 1941.

U. S. GOVERNMENT PRINTING OFFICE: 1941

37

Office - Supreme Court, U. S.
SEP 20
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. 352

GENERAL MOTORS CORPORATION; GENERAL MOTORS SALES CORPORATION; GENERAL MOTORS ACCEPTANCE CORPORATION; GENERAL MOTORS ACCEPTANCE CORPORATION OF INDIANA, INCORPORATED,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF FOR PETITIONERS.

JOHN THOMAS SMITH,
1775 Broadway,
New York, New York;

ERNEST S. BALLARD,
120 South LaSalle Street,
Chicago, Illinois,

Attorneys for Petitioners.

September 20, 1941.

HERBERT POPE,
HENRY M. HOGAN,
FERRIS E. HURD,
HENRY F. HERBERMANN,
Of Counsel.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

TABLE OF CONTENTS.

	PAGE
THE GOVERNMENT'S STATEMENT OF THE QUESTION PRESENTED IS INCOMPLETE AND MISLEADING	1
THE GOVERNMENT'S STATEMENT OF THE FACTS IS IN SOME RESPECTS INACCURATE	2
ARGUMENT	4
I. The Government has not denied that the petition presents questions of great public importance which have not been but should be authoritatively determined by this court	4
II. The Government has failed to reconcile the decision of the court below with this Court's interpretation of the Sherman Law as set forth in *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469	4
III. The decisions of the Second and Eighth Circuit Courts of Appeals with which the decision of the court below is in conflict have never been overruled	8
IV. The court below erred in excluding evidence	9

TABLE OF CASES CITED.

	PAGE
Apex Hosiery Co. v. *Leader*, 310 U. S. 469	4, 5, 6, 8
Dr. Miles Medical Co. v. *Park & Sons Co.*, 220 U. S. 373	6
Ethyl Gasoline Corp. v. *United States*, 309 U. S. 436	6, 7, 9
Fashion Guild v. *Trade Comm'n*, 312 U. S. 457	6, 9, 10
Fed. Trade Comm. v. *Beech-Nut Packing Co.*, 257 U. S. 441	6, 7
Fed. Trade Comm. v. *Raymond Co.*, 263 U. S. 565	7
Great Atlantic & Pacific Tea Co. v. *Cream of Wheat Co.*, 227 Fed. 46	8
Harris v. *United States*, 104 F. (2d) 41, 43	2
Levering & G. Co. v. *Morrin*, 289 U. S. 103	8
United States v. *Colgate & Co.*, 250 U. S. 300	5, 7
United States v. *General Electric Co.*, 272 U. S. 476	7
Whitwell v. *Continental Tobacco Co.*, 125 Fed. 454	8
Wood v. *The United States*, 16 Pet. 342	11

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. 352

GENERAL MOTORS CORPORATION; GENERAL MOTORS SALES CORPORATION; GENERAL MOTORS ACCEPTANCE CORPORATION; GENERAL MOTORS ACCEPTANCE CORPORATION OF INDIANA, INCORPORATED,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF FOR PETITIONERS.

The Government's Statement of the Question Presented is Incomplete and Misleading.

The statement of the first question presented (which relates to the merits) appearing on page 2 of the Government's brief is incomplete and misleading in that (a) it fails to state that the affiliated finance company is a wholly-owned subsidiary of the manufacturer, (b) it fails to identify the commerce supposed to have been restrained, and

(c) it fails to state that the only restraint consisted of refusing to sell.

The ultimate question presented cannot be satisfactorily stated as simply as the Government has attempted. It is properly set forth in paragraph 1 and subparagraphs (a), (b), (c), (d) and (e) on page 11 of the petition.

The Government's Statement of the Facts is in Some Respects Inaccurate.

The government erroneously states in footnote 1 on page 3 of its brief that no attack is now made on the sufficiency of the indictment as a pleading and for this reason refrains from summarizing the allegations of the indictment in its brief. Under the heading "Questions Presented" (Pet., p. 11), the first paragraph is as follows:

> "Do the activities of petitioners *charged* and proved constitute a conspiracy in restraint of interstate trade and commerce in violation of Section 1 of the Sherman Law?"

Also the first error specified in the petition (p. 12) is that "the Circuit Court of Appeals erred in affirming the action of the trial court overruling the demurrer to the indictment." The question is thus raised whether the indictment was sufficient to charge a crime under Section 1 of the Sherman Law. *Harris* v. *United States,* 104 F. (2d) 41, 43. It is therefore essential to the disposition of the petition to consider the allegations of the indictment. They are sufficiently summarized on pages 3 and 4 of the petition.

The statement appearing on page 4 of the Government's brief that "if the services of other finance companies are used, such companies must advance the money necessary to pay for the cars at the time of shipment" is incorrect.

The same misstatement appears in footnote 7 on page 9. This is not a vital matter but, in the interest of accuracy, we set forth a correct statement of the facts in the margin.[1]

It is stated on pages 8 and 9 of the Government's brief that "dealers failing to use GMAC * * * were deprived of a reserve fund on the books of GMAC." This is incorrect. Again the misstatement is not vital, but we nevertheless set forth a correct statement in the margin.[2]

---

[1] The precise manner in which the transaction is conducted is as follows: If a dealer wishes he may give a power of attorney to a person at the factory, authorizing the execution in his name of a trust receipt and promissory note covering shipments ordered by him. Thereupon the factory delivers the cars to a truck-away or drive-away company which delivers them to the dealer, at the same time sending the documents in question to the local GMAC branch office nearest to the dealer, with a sight draft for the amount of the shipment made out to cover either the full invoice price or 10 per cent thereof, so that the dealer may pay cash by taking up the draft for the full amount or finance at wholesale with GMAC and take up only the draft for 10 per cent. If the dealer elects to pay cash in full, he may either furnish it directly or obtain it by financing the transaction through an outside company. In no case does GMAC make any charge for collecting either the full amount of the shipment or 10 per cent thereof. The only charge which the dealer pays in connection with such a transaction is the charge for whatever wholesale financing he wishes, if any. Moreover, the dealer obtains possession of the shipment upon arrival at destination without having to wait to take up the sight draft (R. 842-844).

[2] No reserve fund is set up on the books of GMAC for dealers who do not make use of it (R. 944). Dealers who have an interest in the reserve fund by reason of having used GMAC do not lose such interest upon discontinuing such use but receive payment of the reserve in due course (Gov't Ex. No. 39, R. 3341).

ARGUMENT.

Under the following headings we deal with the contentions of the Government with respect to the reasons set forth in our petition for granting the writ, using our original numbering.

I.

THE GOVERNMENT HAS NOT DENIED THAT THE PETITION PRESENTS QUESTIONS OF GREAT PUBLIC IMPORTANCE WHICH HAVE NOT BEEN BUT SHOULD BE AUTHORITATIVELY DETERMINED BY THIS COURT.

II.

THE GOVERNMENT HAS FAILED TO RECONCILE THE DECISION OF THE COURT BELOW WITH THIS COURT'S INTERPRETATION OF THE SHERMAN LAW AS SET FORTH IN APEX HOSIERY CO. v. LEADER, 310 U. S. 469.

In dealing with this point the Government does not question the construction placed by petitioners upon the charging part of the indictment, namely, that the commerce alleged to have been restrained was the commerce between GMSC and the dealer organization. The indictment does not allege that the dealers are parties to the combination (Ind. par. 34, R. 9-10). That being so, the charge can have no reference to the commerce conducted by the dealers with their customers. This is the construction placed on the indictment by the Court of Appeals (R. 4611-4612) and the theory on which the case went to the jury (R. 1859, 1927).

Moreover, the Government does not deny that the commerce conducted by the dealers with their customers can-

not be interstate commerce. This is pointed out in the petition (footnote 41, p. 20) and is recognized by the Court of Appeals in its opinion (R. 4611-4612).

Further, no attempt is made to gainsay the statement appearing on page 19 of the petition that the finance business is not commerce and certainly not interstate commerce. This also is recognized by the Court of Appeals (R. 4607).

The Government's acquiescence in these contentions confines the issue to that of restraint of the commerce in automobiles between GMSC and the dealer organization, as contended in the petition.

Notwithstanding the foregoing concessions the Government makes the assertion at various places in its brief (pp. 12, 17) that there is a restraint both on the competition of the dealers and on that of outside finance companies. This is wholly irrelevant. In view of the Government's concessions, such restraints are not only outside the scope of the indictment but beyond the reach of the Sherman Law.

The Government has entirely misconceived the argument set forth in Point II of the petition. Our primary contention is that *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469, reaffirms by implication the doctrine of *United States* v. *Colgate & Co.,* 250 U. S. 300, and similar cases, and that its definition of an actionable restraint as a restraint of commercial competition postulates the existence of competitors within the combination. The Government concedes that petitioners are not competitors but an economic unit (Govt. brief, p. 3). It follows that any restraint imposed by that unit in respect of its own commerce is not an actionable restraint under the Sherman Law but a manifestation of the very freedom of action which that law was designed to preserve.

For the same reason the Government's entire argument relative to *Fashion Guild* v. *Trade Comm'n*, 312 U. S. 457, is beside the point. In that case there was a combination of economically independent competitors which imposed mutual restrictions upon their activities.

Petitioners recognize that the *Apex* case holds the Sherman Law applicable to transactions which tend to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, as stated on page 12 of the Government's brief. We insist, however, repeating the language of the petition (p. 21), that the restraint "must take place, altogether or to some extent at least, in a supply originating with an economic unit independent of the author of the restraint." It is this phase of our argument that the Government has entirely overlooked in its discussion of the *Apex* case and other cases cited on pages 12 and 13 of its brief.

Contrary to the statement on page 14 of the Government's brief, our basic assumption does not conflict with *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436, or with *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373, or with *Fed. Trade Comm.* v. *Beech-Nut Packing Co.*, 257 U. S. 441. In the *Ethyl* case the thing condemned was a combination consisting of the defendant, refiners and jobbers which was used as a means of controlling jobbers' prices and suppressing competition among them. In the *Dr. Miles* case the thing condemned was a combination effectuated by a contract which embraced a manufacturer and his purchasers and restricted the competition of the purchasers among themselves in resale prices. In the *Beech-Nut* case the thing condemned was a combination, forced upon dealers by a manufacturer through conduct which went beyond a mere refusal to sell, whereby the dealers were compelled to restrict competition among themselves

in resale prices. In each case the statute was held to prohibit restraints upon the competition between rival sellers in a commercial market.[3] Here no such restraint has been shown. The only restraint charged and established is that involved in the determination of GMSC not to sell a car to a dealer, as the Court of Appeals squarely held (R. 4611-4612).

For the same reason the observation of the Government (brief, p. 15) that a corporation and its officers, or a corporation and its subsidiaries, can conspire to restrain the trade of others has no application to the instant case. Indeed, the failure of the Government to advert to the case of *United States* v. *General Electric Co.*, 272 U. S. 476, cited in the petition (p. 18), must be taken as an admission that numerous economic units, otherwise independent, may be welded into one economic unit through the mere formality of a contract of agency. Here the case is much stronger, for though the several petitioners are formally and legalistically separate entities, substantially and organically they are and always have been one economic unit.

---

[3] The Government's statement of the holding of these three cases appearing on page 14 of its brief is erroneous. They do not stand for the proposition "that a manufacturer cannot, by threats to discontinue supplies, force wholesalers and retailers to adhere to fixed resale prices for his products." *United States* v. *Colgate & Co.*, 250 U. S. 300, squarely held that a manufacturer may refuse to sell to purchasers who will not adhere to fixed resale prices and may announce his intention in advance (p. 307) and this rule was approved in both *Federal Trade Comm.* v. *Beech-Nut Co.*, 257 U. S. 441, 452, and *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436, 457. See also *Fed. Trade Comm.* v. *Raymond Co.*, 263 U. S. 565, where the court concluded "that the Raymond Company in threatening to withdraw its trade from the Snider Company exercised its lawful right, and that its conduct did not constitute an unfair method of competition within the meaning of the (Federal Trade Commission) act" (p. 574).

On page 13 of the Government's brief, it states:

> "In this case petitioners have discriminated against and threatened to curtail the supplies of purchasers who refuse to use G. M. A. C. to the extent desired, and thus have taken from buyers and consumers the advantages which accrue to them from free competition in the market."

In the *Apex* case the strikers who refused to permit shipment of 125,000 dozens of stockings not only threatened but effectuated curtailment of the supply of purchasers. But, despite the fact that the action of the strikers took "from buyers and consumers the advantages which accrue to them from free competition in the market", this Court held that it was not a violation of the Sherman Law.

Above all, the Government entirely overlooks the very essence of the *Apex* decision which is found in its approval of the holding in *Levering & G. Co* v. *Morrin*, 289 U. S. 103, as fully discussed at pages 19 to 21 of our petition.

III.

THE DECISIONS OF THE SECOND AND EIGHTH CIRCUIT COURTS OF APPEALS WITH WHICH THE DECISION OF THE COURT BELOW IS IN CONFLICT HAVE NEVER BEEN OVERRULED.

The Government attempts to avoid the effect of the decision of the Second Circuit Court of Appeals in *Great Atlantic & Pacific Tea Co.* v. *Cream of Wheat Co.*, 227 Fed. 46, by distinguishing it (brief, pp. 15-16), and that of the Eighth Circuit Court of Appeals in *Whitwell* v. *Continental Tobacco Co.*, 125 Fed. 454, by asserting that the latter is no longer good law (brief, pp. 16-17). The contentions advanced are invalid but we need not pause to consider them since the Government ends by conceding that a mer-

chant has a right to sell to whom he chooses (brief, p. 17), which is all we cited the cases for. It attempts, however, to escape from the effect of that rule by importing into it a qualification for which there is not a vestige of authority. Thus the Government's brief says (p. 17):

> "But this right does not permit the coercive imposition of conditions destructive of competition and free trade by a seller who dominates the market."

No decided case holds that a seller, *even though he dominates the market*, may not refuse to sell to anyone he sees fit for any reason whatever. Domination of the market has no bearing on the question. Even though the seller dominates it absolutely, as in the case of a patent, he may refuse to sell at will and may even give price cutting as a reason. This Court so held in *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436, where the present Chief Justice said (p. 457):

> "The picture here revealed is not that of a patentee exercising its right to refuse to sell or to permit his licensee to sell the patented products to price cutters."

It does not aid the Government to reiterate the point that the commerce restricted "is actually that of the dealers" (brief, p. 17). Suppose it is. There is no rule that a manufacturer is required to bring such commerce into existence by selling.

IV.

THE COURT BELOW ERRED IN EXCLUDING EVIDENCE.

1. *Fashion Guild* v. *Trade Comm'n*, 312 U. S. 457, does not justify the exclusion of our evidence that the restraint effectuated was reasonable. In that case the end sought

to be accomplished by the conspiracy was unlawful (p. 457). Here it was lawful (R. 4633). That being so, we should have been permitted to show that the methods adopted to accomplish the end were reasonable. The *Fashion Guild* decision itself so recognizes (p. 468).

This point was in effect conceded by the Court of Appeals itself. In the course of its opinion it said (R. 4609):

> "In our opinion the only possible excuse for imposition of the finance restrictions lies in the reasonableness of the GMAC rates, and in this connection there is no contention that other discount companies can not meet the requirement."

We did contend precisely that, viz., that other discount companies could not meet the requirements of proper financing. But the evidence was excluded by the trial court. Although upholding the exclusion (R. 4619), the Court of Appeals said in the same breath that, had we established what that evidence was intended to show, we might have justified our conduct (R. 4609). The exclusion was not only error; it was sufficiently important error to justify review, since it may have controlled the outcome of the case.

The fact that the effect of petitioners' conduct was to keep down the cost of financing does not make it bad. The statement in the *Fashion Guild* case referred to by the Government (brief, p. 19) is that *a combination* might be unlawful even if it permanently reduced prices (p. 467). There was no combination here,—only a single manufacturer.

2. The Government attempts to justify the exclusion of *all* of petitioners' dealer evidence on the ground that it would not have refuted the Government's dealer evidence (brief, p. 21). We respectfully say that our offers of proof (R. 1040-4, 1051-4, 1059-60, 1062-86, 1131-45, 1151-2, 1154-5, 1160-1, 1179-82, 1216-7, 1219-23, 1286-8) show that the con-

trary is true. The Government's dealer evidence was the basis for the inference that a conspiracy had been formed as charged. The Court of Appeals so expressly held (R. 4612). Our dealer evidence would have refuted this inference. *Wood* v. *The United States,* 16 Pet. 342, 359-361. Its exclusion was error and sufficiently serious error to justify review.

Respectfully submitted,

JOHN THOMAS SMITH,
1775 Broadway,
New York, New York.

ERNEST S. BALLARD,
120 South LaSalle Street
Chicago, Illinois.
Attorneys for Petitioners.

September 20, 1941.

HERBERT POPE
HENRY M. HOGAN
FERRIS E. HURD
HENRY F. HERBERMANN
Of Counsel.

38

Office - Supreme Court, U. S.
FILED
OCT 29 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. 352

GENERAL MOTORS CORPORATION; GENERAL MOTORS SALES CORPORATION; GENERAL MOTORS ACCEPTANCE CORPORATION; GENERAL MOTORS ACCEPTANCE CORPORATION OF INDIANA, INCORPORATED,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR REHEARING.

JOHN THOMAS SMITH,
1775 Broadway,
New York, New York;

ERNEST S. BALLARD,
120 South LaSalle Street,
Chicago, Illinois,

Attorneys for Petitioners.

October 24, 1941.

HERBERT POPE,
HENRY M. HOGAN,
FERRIS E. HURD,
HENRY F. HERBERMANN,
Of Counsel.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

Table of Cases.

	PAGE
Johnson v. *Wharton*, 152 U. S. 252	2
Local 167 v. *United States*, 291 U. S. 293, 298	2
Oklahoma v. *Texas*, 256 U. S. 70, 85	2

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. 352

GENERAL MOTORS CORPORATION; GENERAL MOTORS SALES CORPORATION; GENERAL MOTORS ACCEPTANCE CORPORATION; GENERAL MOTORS ACCEPTANCE CORPORATION OF INDIANA, INCORPORATED,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING.

COME now the petitioners in the above entitled proceeding and petition the Court to grant a rehearing therein and in support of said petition show as follows:

On August 6, 1941, petitioners filed a petition for a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit, affirming a judgment of conviction rendered against petitioners after trial and verdict by the United States District Court for the Northern District of Indiana in a criminal prosecution for conspiracy in restraint of interstate trade and commerce in violation of Section 1 of the Sherman Law. On October 13, 1941, this Court entered its order denying said petition.

In addition to the matters presented in our original petition, there is one consideration not heretofore explicitly urged which petitioners feel in duty bound to present to the Court. Briefly set forth it is as follows:

The Government has instituted against these petitioners a civil suit in equity, based in large part upon the same transactions as those involved in the instant criminal prosecution, seeking to divorce General Motors Acceptance Corporation from General Motors Corporation, and the time to answer, plead or move therein has been extended for the purpose of awaiting the final decision in this case. (See our original petition, page 16, note 37.) The applicable statutes confer upon the defendants in that suit (petitioners here) a right of appeal from the District Court directly to this Court.[1]

Under the doctrine of *res judicata*, however, denial of the writ in the instant case will apparently preclude consideration on the merits of the issues presented in the civil action to the extent that they are the same as the issues determined by the courts below herein. *Oklahoma* v. *Texas*, 256 U. S. 70, 85; *Local 167* v. *United States*, 291 U. S. 293, 298; *Johnson Company* v. *Wharton*, 152 U. S. 252. This will deprive this Court, *pro tanto*, of the opportunity of passing on the merits of the issues in the civil suit. In consequence, this Court will have impaired the appellate jurisdiction conferred upon it by Congress in the civil case and will have bound itself by the decision of an inferior tribunal. At the same time these petitioners will be deprived of their right to have this Court pass on the vital

---

[1] Act of February 11, 1903, c. 544, §2, 32 Stat. 823, as amended by Act of March 3, 1911, c. 231, §291, 36 Stat. 1167, 15 U. S. C. A. §29; Act of March 3, 1911, c. 231, §238, 36 Stat. 1157, as amended by Act of January 28, 1915, c. 22, §2, 38 Stat. 804, and Act of February 13, 1925, c. 229, §1, 43 Stat. 938, 28 U. S. C. A. §345.

issues presented in that proceeding. We respectfully suggest that this Court should interpose its power to prevent such a result.

To the petitioners it is of no moment whether the final adjudication of such issues be made by this Court in the criminal case or in the civil suit. What is of paramount importance is that this Court should not permit its consideration of the civil case to be embarrassed by the pronouncement of an inferior tribunal and so lose its judicial freedom to exercise in all its phases the appellate jurisdiction exclusively conferred upon it by statute. It is submitted, therefore, that this Court should grant certiorari both as a matter of sound judicial administration and as a matter of respect to an Act of Congress.

In addition to the foregoing, we desire to call the Court's attention to an event of vital significance which has transpired since the filing of our petition for certiorari. On August 21, 1941, the Board of Governors of the Federal Reserve System, pursuant to the President's Executive Order of August 9, 1941 (6 Fed. Reg. 4035), adopted Regulation "W" imposing restrictions upon consumer credit (6 Fed. Reg. 4443). Under Section 4, subdivisions (a) and (b), of said regulation, extensions of instalment sale credit in connection with the purchase and sale of passenger automobiles are prohibited in cases in which the deferred balance exceeds 66⅔% of the purchase price or the maximum maturity exceeds eighteen months. Petitioners' restrictions were substantially identical (R., p. 3221). The imposition of those restrictions (as found by the Court below) resulted in restraining the interstate trade in General Motors automobiles referred to in the indictment. This constituted the precise conspiracy of which the petitioners were

convicted.[2] Petitioners are, therefore, now required by federal regulation to impose the same restrictions as those which, when imposed voluntarily, were held to constitute unlawful restraint of trade in General Motors automobiles. That the effect of the use of such restrictive means upon the trade in automobiles is identical, whether they be imposed by the manufacturer voluntarily or pursuant to Governmental regulation, is obvious. Since such restrictions have been imposed by regulation *without Congressional action suspending the operation of the Sherman Act*, it must follow that the use of similar restrictive means by private parties did not violate that statute unless the purpose sought to be achieved thereby was in itself illegal under the statute. In the instant case such purpose was not illegal. It was not and could not have been the reduction in the volume of sales of General Motors cars. It was either (as these petitioners assert) the preservation of the goodwill of the ultimate consumers of the cars by protecting them from unsound credit terms and exorbitant charges or (as the Government maintains) the acquisition by General Motors Acceptance Corporation (through such means as the Government has now itself adopted and has therefore

---

[2] Referring to the Los Angeles conference held in 1925, at which the conspiracy charged was supposed to have been entered into, the Circuit Court of Appeals said (R., p. 4595):

> "Obviously the executives were looking beyond the Los Angeles situation and planning in terms of nation-wide merchandising of General Motors products. They feared that if a finance policy based on non-recourse, lower down payments and longer terms were permitted to be used by General Motors dealers in southern California, 'it would spread all over the United States and it would seriously jeopardize the whole installment plan of purchase, and we (the executives) felt, therefore, that we could not endorse that policy so far as General Motors Corporation was concerned.' Grant admitted that the Los Angeles plan of action was to be carried in any part of the country where similar circumstances prevailed."

approved as legal) of as much of the business of financing General Motors automobiles as possible (Indict. Par. 35, R., p. 10). Under either interpretation it is obvious that the intent ascribed to petitioners is not illegal under the Sherman Act.

For the above reasons it is respectfully prayed that this petition for a rehearing be granted, that, upon further consideration, the order denying the petition for certiorari be vacated and an order be entered allowing such writ.

Respectfully submitted,

JOHN THOMAS SMITH,
1775 Broadway,
New York, New York,
ERNEST S. BALLARD,
120 South LaSalle Street,
Chicago, Illinois,
Attorneys for Petitioners.

October 24, 1941.

HERBERT POPE,
HENRY M. HOGAN,
FERRIS E. HURD,
HENRY F. HERBERMANN,
Of Counsel.

I, JOHN THOMAS SMITH, counsel for the above named petitioners, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

JOHN THOMAS SMITH